United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7054

(42060)

To be argued by
MICHAEL AMBROSIO

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATHANIEL COOPER,
Plaintiff-Appellant,

—against—

GUARDS: DOYLE OGLESBY and STEVEN DAVIS,
Defendants,

and

CITY OF NEW YORK; DEPARTMENT OF SOCIAL SERVICES; CORPORATION COUNSEL; and MRS. CUDSOUL, Supervisor, Department of Social Services, 330 Jay St., Brooklyn, New York,
Defendants-Appellees.

P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

W. BERNARD RICHLAND,
Corporation Counsel
of the City of New York,
Attorney for the Appellees,
Municipal Building,
New York, New York 10007.
566-8305

L. KEVIN SHEERIDAN,
MICHAEL AMBROSIO,
of Counsel.

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATHANIEL COOPER,

Plaintiff-Appellant,

—against—

WARDS: DOYLE OGLESBY and STEVEN DAVIS,

Defendants,

and

CITY OF NEW YORK; DEPARTMENT OF SOCIAL SERVICES; CORPORATION COUNSEL; and MRS. CUDSOUL, Supervisor, Department of Social Services, 330 Jay St., Brooklyn, New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

Preliminary Statement

Plaintiff, *pro se*, commenced this civil rights action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343 for recovery of punitive and compensatory damages. Plaintiff's claim arises out of an alleged assault, claimed to have taken place on or about December 19, 1972.

On December 6, 1974, Hon. Dudley B. Bonsal, United States District Judge for the Southern District of New York, granted summary judgment to defendants The City of New York, the New York City Department of Social

Services, the City's Corporation Counsel and Mrs. Cudsoul, a Department of Social Services supervisor. The district court also directed that service of process be made upon the two Social Services guards, named in the caption, who had not earlier been served. Plaintiff appeals from Judge Bonsal's decision.*

Questions Presented

The bases upon which Judge Bonsal granted summary judgment in favor of Appellees were that the City and its governmental agencies are not "persons" within the meaning of Section 1983 and that, in addition, the appellees, including Mrs. Cudsoul, could not be held liable under Section 1983 on a theory of *respondeat superior*. Insofar as Section 1983 is concerned, we believe the authorities, including decisions of this Court, overwhelmingly support Judge Bonsal's view of the reach of that section. However, since Judge Bonsal's decision was rendered, this Court, in the case of *Brault* v. *Town of Milton*, —— F. 2d —— (Docket #74-2370, February 21, 1975), petition for *en banc* rehearing pending, has held that under 28 U.S.C. Section 1331 actions for violation of the rights guaranteed by the 14th Amendment may be maintained against municipalities. The precise reach of the *Brault* decision is at this point most unclear, and, it should be noted, the plaintiff here has not alleged Section 1331 jurisdiction. However, as this Court may determine that *Brault* is here

---

* We note that the district court's decision closes with a direction that an order be settled on notice. The docket sheet entries do not indicate that any order was entered. Due to the lack of an order it may well be that this appeal is not proper. However, as it is a *pro se* matter already before this Court and with further proceedings to be had in the district court, we believe the appeal should be considered on the merits and have so briefed it.

relevant, we set forth our reasons for urging that *Brault* is incorrect and, in any event, inapplicable here.

We would note that by notice of motion dated April 4, 1975, we have requested that this brief also be considered as an *amicus curiae* brief on the pending application for *en banc* rehearing in *Brault*.

The Facts

The complaint, which is somewhat confusing, appears to allege that plaintiff was the victim of a robbery and beating on December 19, 1972, while in or about an office operated by the Department of Social Services of the City of New York. Plaintiff further alleges that he was lawfully entering the building in order to seek public assistance when his entry was barred by guards. According to the complaint, the guards beat the plaintiff and robbed him of $10.00. Plaintiff's application for redress in the United States District Court for the Southern District of New York is premised upon an alleged violation of his civil rights.

On or about August 2, 1973, the City served an answer. On November 18, 1973, Judge Bonsal denied plaintiff's motion for a default judgment which was based on the fact that the answer had been served a few days late, and granted the defendant's motion for an extension of time to answer to August 2, 1973.

On October 18, 1974, plaintiff was orally deposed by defendants. At that time plaintiff indicated the theories upon which he believed the City, Corporation Counsel, and the Department of Social Services could be found liable. According to plaintiff these defendants were liable on the legal theories of *respondeat superior* and principal and agent.

"Q. Your theory of law, under which you name the Department of Social Services and the Corporation Counsel of the City of New York, is the theory of *respondeat superior?*

A. Yes." (page 13)

* * *

"Q. In what way did the Corporation Counsel violate any of your constitutional rights?

A. Cudsoul [a Department of Social Services supervisor] were employed, Cudsoul and three other defendants were employed by the Department of City Social Welfare. The general rule is that the master is liable for all acts of his servant done in the scope and course of the employment. The doctrine here involves his call. The doctrine here is called respondent superior, *Wallis* vs. *Parlor*, 137, New York, *Sydenham* vs. *Morris*. In the practical result, the same rules govern torts, liability of principal and agent." (page 16)

* * *

"Q. As to those matters, I haven't taken any action, but the main reason that I wanted to examine you today, was to determine and have you put on the record, your theory under which you sued the Department of Social Services and the Corporation Counsel, and the other named defendants, that's Davis and the others that you stated, but I'm concerned mainly with the Department of Social Services and the Corporation Counsel, and it's your statement that you're suing them under the theory of *respondeat superior*, that the master is responsible for the acts of the servant.

A. As well as agents and principle, such as Corporation Counsel and Department of Social Services, agent and principle." (page 24)

On November 11, 1974, the defendants City of New York, Corporation Counsel and Department of Social Services moved to dismiss the complaint or, in the alternative, for summary judgment. On December 6, 1974, Judge Bonsal granted summary judgment to the above named defendants and to Mrs. Cudsoul, a supervisor at the Department of Social Services, whom Judge Bonsal had agreed on November 11, 1974 to treat as a defendant in this action. The Court in its decision found no material issues of fact to exist as to any of these four defendants. Moreover, as to the City, Corporation Counsel and Department of Social Services, the court ruled that it had no subject matter jurisdiction because neither the City nor its agencies are "persons" within the meaning of Section 1983. The court further found that the doctrine of *respondeat superior* did not suffice to hold the defendants liable because some personal responsibility of the defendants must be demonstrated in order to hold them liable for monetary damages under §1983.

Decision Below

Bonsal, *D. J.*

Plaintiff, *pro se,* commenced this civil rights action under 42 U.S.C. §1983 and 28 U.S.C. §1343 for recovery of compensatory and punitive damages against Doyle Oglesby, a guard for the Department of Social Services until approximately March 1973, the Department of Social Services ("DSS"), the City of New York, and the "Corporation Counselor, Municipal Building." The City of New York, DSS and the Corporation Counsel move to dismiss the complaint pursuant to F.R.Civ.P. 12 or, in the alternative, for summary judgment pursuant to F.R.Civ.P. 56.

At argument on this motion on November 11, 1974, the Court granted plaintiff's motion to treat the complaint as

amended to include as defendants Mrs. Cudsoul, the supervisor at the DSS office, 330 Jay Street, Brooklyn, and Guard Steven Davis. Defendants' motion shall apply with equal force to the complaint as amended as aforesaid.

The Court has considered plaintiff's deposition upon oral examination taken on October 18, 1974 and the affidavits submitted by the parties. The Court finds no material issues of fact exist as to the City, DSS, the Corporation Counsel and Mrs. Cudsoul.

From the papers submitted, it appears that plaintiff alleges that on December 19, 1972, while he was at the "Medicade Building" at 330 Jay Street, Brooklyn, for the purpose of discussing his welfare status, he was beaten without just cause, robbed and falsely arrested by Guards Oglesby and Davis. Plaintiff alleges that he was hit on the head with a night stick, rendering him unconscious and causing him to suffer five stitches in his left forehead. Plaintiff further alleges that while he was in handcuffs he was hit in the nose and mouth by Guard Davis, requiring him to undergo dental work and causing him pain and suffering. Finally, plaintiff alleges that he was robbed of $10.00 and eight subway tokens. Plaintiff appears to seek compensatory and punitive damages in the amount of $50,000.00.

Turning to defendants' motion, plaintiff's claims for damages under 42 U.S.C. §1983 against the City of New York, DSS and the Corporation Counsel must fail because this Court has no subject-matter jurisdiction. Neither a municipality nor its governmental agencies are "person[s]" within the meaning of section 1983. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Zuckerman* v. *Appellate Division, Second Department, Supreme Court of the State of New York*, 421 F.2d 625 (2d Cir. 1970).

Plaintiff contends that the defendants are liable under the doctrine of *respondeat superior* for the acts of the Guards Oglesby and Davis. However, the rule in this circuit is that where monetary damages are sought under section 1983, the general doctrine of *respondeat superior* does not suffice and a showing of some personal responsibility of the defendant is required. *Johnson* v. *Glick*, 481 F.2d 1028, 1034 (2d Cir. 1973). Plaintiff's deposition shows no personal responsibility on the part of any of the defendants except Guards Oglesby and Davis. Moreover, plaintiff does not allege any actions by Mrs. Cudsoul which deprived him or caused him to be deprived of his civil rights. *See Johnson* v. *Glick*, *supra*, and cases cited therein. Plaintiff therefore fails to assert any cognizable federal claim against her.

Accordingly, the motion for summary judgment as to the City of New York, DSS, the Corporation Counsel and Mrs. Cudsoul must be granted.

Neither Guard Oglesby nor Guard Davis has appeared in this action, and the file does not indicate that they have been served. *See* F.R.Civ.P. 4(c). The United States Marshal is directed to effect service of the summons and complaint on Guards Oglesby and Davis at their last address, to be furnished by the Department of Social Services.

Settle order on notice.

Applicable Constitutional and Statutory Provisions

14th Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may

by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 United States Code

§1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 United States Code

§1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 United States Code

§1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

* * *

ARGUMENT

The District Court properly determined that plaintiff's cause of action could not be maintained against these appellees under 42 U.S.C. § 1983. It should not be held that plaintiff may maintain an action in Federal Court against any of these appellees based upon the 14th Amendment and 28 U.S.C. § 1331.

(1)

We submit that Judge Bonsal's decision clearly shows why, under the applicable authorities, the plaintiff's Section 1983 action should be dismissed as against the appellees. In addition to the authorities there cited, we would note the following decisions, all standing for the proposition that municipalities and their agencies are not "persons" within the meaning of Section 1983:

Cheramie v. *Tucker*, 493 F.2d 586 (5th Cir., 1974);

Fischer v. *Cahill*, 474 F.2d 991 (3rd Cir., 1973);

Davis v. *U.S.*, 439 F.2d 1118 (8th Cir., 1971);

La Rouche v. *City of New York*, 369 F.Supp. 565 (S.D.N.Y., 1974);

Sams v. *N.Y. State Parole Board*, 352 F.Supp. 296 (S.D.N.Y., 1972).

Moreover, even in cases, unlike this one, where a defendant is a "person" within the meaning of §1983, he cannot be held liable for monetary damages on the theory of *respondeat superior*. Some showing of personal responsibility is required to find liability. *Johnson* v. *Glick*, 481 F.2d 1028 (2nd Cir., 1973), cert. den. 414 U.S. 1033; *Jennings* v. *Davis*, 476 F.2d 1271 (8th Cir., 1973); *Schumate* v. *People of State of New York*, 373 F.Supp. 1166 (S.D. N.Y., 1974); *Mukmuk* v. *Commissioner of Correctional Services*, 369 F.Supp. 245 (S.D.N.Y., 1974); *Nugent* v. *Sheppard*, 318 F.Supp. 314 (N.D., Ind., 1970). Because it has not been alleged, and indeed, it is logically impossible to show that the City of New York, a municipal corporation, and its governmental agencies are *personally* responsible for plaintiff's alleged injuries, the defendants were properly granted summary judgment herein.*

---

* The Court below also granted summary judgment to Mrs. Cudsoul whom the plaintiff had originally failed to make a party to this suit. Judge Bonsal held that plaintiff had failed to allege any specific acts by her which deprived him or caused him to be deprived of his civil rights. In so far as plaintiff may suggest that she is liable, as a supervisor, on the basis of *respondeat superior*, the argument made above would apply.

(2)

Subsequent to Judge Bonsal's decision on December 6, 1974, this Court ruled in *Brault* v. *Town of Milton*, Docket No. 74-2370 (February 21, 1975), that a municipality could be held liable for damages in a cause of action founded directly upon the 14th Amendment if jurisdiction is premised upon 28 U.S.C. §1331. Although the plaintiff here did not allege jurisdiction under this statute, the defendants are aware that the pleadings of a *pro se* litigant are traditionally read in a liberal manner. We shall, therefore, discuss the *Brault* decision as though plaintiff had alleged jurisdiction under 28 U.S.C. §1331.

Our position with respect to *Brault's* relevance here is as follows: first, it was incorrectly decided; second, even if correctly decided on its precise facts, it should be limited to the precise facts and not extended to allow a finding of liability and the award of damages against a municipality in the type of situation present here.

(a)

The principal authorities relied upon in *Brault* as supporting the proposition that a municipality may be cast in damages in federal court for a violation of a party's 14th Amendment rights are *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and a suggestion in Mr. Justice Brennan's concurring opinion (joined by Mr. Justice Marshall) in *City of Kenosha* v. *Bruno*, 412 U.S. 507, 516 (1973), to the effect that in that case, where only equitable relief was sought, the district court had jurisdiction to determine if the municipality had violated the plaintiff's 14th Amendment rights and, if it had, to grant appropriate injunctive relief. In addition, the *Brault* majority relied on a district court decision, *Dupree* v. *City of Chattanooga*, 362 F. Supp. 1136 (E.D. Tenn., 1973),

and a law review article, Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, at 1558-59 (1972). Very respectfully, none of the authorities cited, with the possible exception of the Dellinger article, supports the result reached in *Brault*. (Indeed, while Professor Dellinger would favor an award of damages in the situation presented in the case at bar, there is no suggestion in his article that he would extend this theory of liability to the sort of situation presented in *Brault*.)

Because *Brault* is so unclear in its implications and so potentially far reaching in its effect, we believe that both its theoretical approach and implications, and the authorities upon which it purports to rely must be examined in detail. However, our position can here be very briefly summarized. It is as follows:

1. The 14th Amendment does not, without more, create a cause of action cognizable in the federal courts for violation of the rights guaranteed thereunder. As the Amendment itself suggests (in Section 5), congressional action is required before such an action may be maintained in federal court.

2. Even if a cause of action for equitable relief may be founded on the 14th Amendment alone, as suggested by Mr. Justice Brennan in his concurring opinion in *City of Kenosha* v. *Bruno*, a cause of action for damages should not be found by implication. Cf. *City of Kenosha* v. *Bruno*, *supra*, 412 U.S. at 516-517 (concurring opinion of Douglas, J., suggesting need to distinguish between types of relief sought). In the case of municipalities and their agencies, a refusal to imply a cause of action for damages is particularly appropriate in view of the Congressional decision, reflected in Section 1983, to exempt municipalities from such liability.

3. Even if the judicial power to create remedies for violations of the Constitution, suggested by *Bivens*, is to be extended to 14th Amendment violations, it is improper to extend the individual liability of actual tortfeasors, approved in *Bivens*, to the tortfeasors' employers, municipal or otherwise, based simply upon principles of *respondeat superior*.

4. Finally, while we argue that *Brault* should not be extended to the situation presented here, because in *Brault* the municipality was held liable for its actions taken *qua* municipality, whereas here liability is sought to be imposed upon the City of New York on a theory of *respondeat superior*, we would urge that even if here, in a classic tort setting, liability may be imposed under the 14th Amendment (as Professor Dellinger advocates), *Brault*, which imposed liability in a quasi-tort situation, is nonetheless wrong. Where a municipality adopts and enforces laws which are later judicially determined to be invalid there is no sound policy reason for imposing damages upon the municipality for such conduct. It is this very result which *Brault* appears to sanction, and it is this possibility which makes the *Brault* decision not merely one unsupported by authority, but also a most unfortunate, indeed possibly disastrous, precedent. As we read *Brault*, it appears to create a new form of federal quasi-tort action which is applicable in a wide variety of contexts involving governmental activities, and which goes far beyond the classic tort situation presented in *Bivens* and far beyond anything suggested in *Bivens* as appropriate judicial activism in creating rights and remedies.

(b)

Before discussing what we consider to be the flaws in the reasoning of the *Brault* decision we shall consider the various authorities cited and relied upon by the *Brault*

majority. It is perhaps helpful to consider first Professor Dellinger's article. As to most of that article, largely devoted to an analysis of *Bivens*, we have no complaint. However, on one point, some comment is appropriate.

In his article, in the pages cited in *Brault* (85 Harv. L. Rev. at 1558-59), the Professor, waxing enthusiastic over the possibility of a broad 14th Amendment cause of action, states (*id.* at 1559) "section 1983 may simply be unnecessary." By the same token, then, also "unnecessary" have been the labors of the courts in cases such as *Monroe* v. *Pape*, 365 U.S. 167 (1971), and *City of Kenosha* v. *Bruno, supra*, and a host of other cases where the courts, taking the matter very seriously, and indeed evidencing great difficulty, have wrestled with the question of §1983 jurisdiction. If this question was as simple as Professor Dellinger and the *Brault* majority appear to indicate, one can only wonder why this simple answer took so long to appear. One may wonder why, for example, it did not occur to Mr. Justice Douglas as he was working on his monumental opinion in *Monroe* v. *Pape*. See *Monroe* v. *Pape, supra*, 365 U.S. at p. 169, where it is noted that the plaintiff did in fact allege as an alternative basis for federal jurisdiction Section 1331, although this basis for federal jurisdiction was apparently not urged on the appeal. See, also, *City of Kenosha* v. *Bruno, supra*, where the Court, in a case not involving damages, but only equitable relief, declined to pass on the issue of Section 1331 jurisdiction—so easily answered by Professor Dellinger—without additional briefs and argument in the lower courts. At the very least, these cases strongly suggest that the matter of implying a cause of action for violation of the 14th Amendment is not nearly so simple as Professor Dellinger and the *Brault* majority would have it.

Further undercutting the view that Section 1331 jurisdiction may be freely expanded and new constitutional torts created is the *Bivens* decision itself. In *Bivens* the plaintiff alleged that the defendants, six federal agents, violated his 4th Amendment right to be secure from unreasonable searches and seizures when they entered his home without a warrant and searched the premises. The district court dismissed the complaint for failure to state a cause of action. This Court affirmed the district court. The Supreme Court reversed, holding (page 389) that the 4th Amendment gives rise to a cause of action for damages when it is violated by a federal agent acting under color of his authority. The Court found it anomalous that the plaintiff, who alleged a deprivation of federal rights by federal agents, should be compelled to resort to the state courts for a remedy. This anomaly was compounded by the defendants' admission that, as a matter of policy, they removed such suits to the federal courts. Thus, under one view, *Bivens* may be regarded as simply giving to that plaintiff the same choice of forum already available to the defendant federal agents.

The *Brault* majority finds in *Bivens* "sweeping approbation of constitutionally based causes of action" (typed opinion of this Court in *Brault*, p. 6).* Very respectfully, we find no such "sweeping approbation" in *Bivens* as would warrant radical extension of that 6-3 holding of the Supreme Court (Harlan, J., concurring but counseling restraint) of the sort which has taken place in *Brault*. More specifically, *Bivens* imposed liability on the agents themselves, in a classic tort situation (concededly, the type presented in the instant case—but not in *Brault*), where

---

* At the time this brief was drafted, printed copies of the Court's slip opinion were not available.

the Court's opinion clearly exhibits concern that if plaintiff did not have a federal remedy in federal court, he would, as a practical matter, be remediless. Further, *Bivens* does not, as the *Brault* majority appears to assume, necessarily sanction an award of money damages as the remedy for *any* violation of a constitutional right. Rather, it expressly recognizes that "special factors", including the question of who is to pay such damages, and the presence or absence of congressional declarations on the subject, must be considered in determining the appropriateness of this remedy. See 403 U.S. at 396-97.

Bivens is clearly distinguishable from both the *Brault* situation and the case at bar in that in both *Brault* and this case we have specific evidence of congressional intent, expressed in Section 1983 and exhaustively documented in *Monroe* v. *Pape*, that municipalities should not be held liable in federal court for violations of the 14th Amendment. Furthermore, although concededly this is not so in the case at bar, at least in *Brault* the conduct of the defendant town was nothing like the sort of tortious conduct alleged in *Bivens*.

With respect to the *Brault* majority's reliance upon *Dupree* v. *City of Chattanooga*, *supra*, 362 F. Supp. 1136, we would note, initially, that that court, in finding Section 1331 jurisdiction, cites *City of Kenosha* v. *Bruno*, as well as other cases, but does so without discussion and without bothering to note that this most difficult question was expressly left open in *City of Kenosha*. Furthermore, the *Brault* majority fails to note that *Dupree* was an action for declaratory and injunctive relief, not damages—a distinction which may well be of significance in light of the legislative history of Section 1983. See *Monroe* v. *Pape*,

supra; *City of Kenosha* v. *Bruno*, supra at 516-17 (Douglas, J. concurring).*

(3)

In *Fischer* v. *City of New York*, 312 F.2d 890 (2nd Cir., 1963), this Court held that the plaintiff's claim against the City was barred because the municipality is not liable under Section 1983. The Court went on to add: "Insofar as plaintiff's claim is based, not on the Civil Rights Act, but directly upon Section 1 of the 14th Amendment, we affirm on the ground that plaintiff has not stated a claim upon which relief can be granted . . . ." Although that case is on all fours with *Brault* v. *Town of Milton*, it was rendered prior to *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), which introduced the novel concept of a cause of action founded directly upon the Constitution. We submit for the reasons given *infra* that despite the *dicta* in *Bivens* which was relied upon in *Brault*, *Fischer* correctly refused to create a constitutional cause of action for violation of the 14th Amendment.

Whatever "sweeping approbation" *Bivens* may give to causes of action founded upon other provisions of the Constitution, we submit that it affords no basis for premising a cause of action upon the 14th Amendment. The Court in *Bivens* recognized that the Fourth Amendment does not provide for its enforcement and proceeded to imply a remedy in damages where Congress had not taken

* In our research, we have uncovered but one other appellate decision appearing to hold that a damage action may be maintained under Section 1331 based upon a claimed violation of the 14th Amendment (together with the First Amendment), *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (3rd Cir., 1974). In the Court's discussion of jurisdiction, however, no mention was made of *Kenosha* or any other court decision, and the question of such jurisdiction is discussed most perfunctorily.

affirmative action (p. 396). The Fourteenth Amendment, on the contrary, provides quite clearly, in Section 5, that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We submit that the power of enforcement conferred upon Congress by Section 5 is plenary and complete and has been exercised by it in the various civil rights laws. We further submit that the 14th Amendment vests no residuary power in the judicial branch to create affirmative remedies not authorized by Congress to vindicate rights granted by that amendment.

When Senator Howard introduced the proposed 14th Amendment of the Constitution in the Senate on May 23, 1866, he said concerning Section 5:

> "It gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. Without this clause, no power is granted to Congress by the amendment or anyone of its sections. It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no state infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it imposes upon Congress this power and duty." *Cong. Globe*, 39th Cong., 1st Sess., 2768.

Only thirteen years after the ratification of the 14th Amendment, the Supreme Court took the opportunity to comment upon Section 5 in *Ex Parte Virginia*, 100 U.S. 313 (1879), a case challenging the Civil Rights Act of March 1, 1875 (at p. 346):

> "All of the Amendments derive much of their force from this latter provision [Section 5]. It is not said the judicial power of the General Government shall

> extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged."

This same position was reiterated by Justice Harlan in his dissent in the *Civil Rights Cases,* 109 U.S. 3, 45-46 (1883) and reaffirmed by Justice Brennan in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966). In the latter case it is stated (at p. 651):

> "Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guaranties of the Fourteenth Amendment."

Of course, we do not suggest that the 14th Amendment would be a nullity without congressional action pursuant to Section 5. Obviously, the 14th Amendment, like any other provision of the Constitution, can be raised defensively in an appropriate forum. We submit, however, that an affirmative remedy must be created by Congress which is alone empowered to enforce the 14th Amendment.* Indeed, Congress appears to have accepted this interpretation of its role under the 14th Amendment by its enactment of the predecessor statute of 42 U.S.C. §1983 and 28 U.S.C. §1343.

---

* The 4th Amendment which was at issue in *Bivens,* unlike the 14th Amendment, at issue here, does not purport to confer enforcement power upon any branch of the government. It is, therefore, more susceptible to being interpreted, as it was in *Bivens,* as conferring the power to enforce it jointly upon the legislative and judicial branches.

The Congress which enacted the Act of April 20, 1871, had adopted the 14th Amendment less than three years before. It can be presumed that Congress had a clear view of its power under the Amendment. The Act of April 20, 1871 created a substantive cause of action to enforce the 14th Amendment (now 42 U.S.C. §1983) and gave jurisdiction over this cause of action to the federal courts (now 28 U.S.C. §1343 (3)). Obviously, if the Congress believed that the 14th Amendment conferred upon the federal judiciary some residual power to enforce it through the creation of affirmative remedies, it would not have created the substantive cause of action. If this Court's analysis in *Brault* of its power to affirmatively enforce the amendment is correct, then Congress was wasting its time in creating a cause of action in the Act of April 20, 1871. All that was required was a jurisdictional provision. Indeed, Professor Dellinger in the article cited with approval in *Brault, Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1559, blithely suggests that "section 1983 may simply be unnecessary." While such a cavalier attitude towards congressional enactments may be appropriate for a law professor, it scarcely suggests the deferential attitude traditionally shown by our courts toward the action of a coordinate and popularly elected branch of the government.

We submit that the 14th Amendment clearly contemplates its enforcement by the Congress; that the Congress has enforced it; and that the Courts are without power to create an additional remedy, especially when Congress has specifically rejected that remedy.

(4)

Assuming, but not conceding, that the federal courts retain some power to fashion affirmative remedies based upon the 14th Amendment, we submit that the Court erred in *Brault* in creating a cause of action for damages applicable to municipalities. As noted above, Congress has created by the Act of April 20, 1871, a cause of action to enforce the 14th Amendment and committed it to the jurisdiction of the federal courts. This cause of action, however, has been repeatedly held by the Supreme Court not to apply to municipalities, *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). As shown by Mr. Justice Douglas in his opinion in *Monroe*, the Congress specifically rejected a proposed amendment to the Act of April 20, 1871, which would have imposed liability upon municipalities. We submit that this Court in *Brault* should have deferred to the clear congressional intent to exclude municipalities from liability for violations of the 14th Amendment.

In *Bivens*, which is the principle case upon which the *Brault* decision rests, the Supreme Court did say, as quoted in *Brault*,

> "But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U.S., at 684 [Footnote omitted]." *Bivens*, at p. 396.

But this "sweeping approbation" of constitutionally based cause of action was quickly qualified by the Court in the very next sentence, which is not included in the quotation as it appears in *Brault*. "The present case in-

volves no special factors counselling hesitation in the absence of affirmative action by Congress." The Supreme Court then went on to indicate what it meant by "special factors" counselling hesitation.

> "Finally, we cannot accept respondents' formulation of the question as to whether the availability of money damages is necessary to enforce the Fourth Amendment. *For we have here no explicit declaration* that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Bivens, supra*, at p. 397 (emphasis added).

In *Brault* there was present the precise special factor counselling hesitation of which the Supreme Court warned in *Bivens*. The Supreme Court in *Monroe*, *Moor* and *City of Kenosha* has made crystal clear Congress' intent to exclude municipalities from liability for violations of §1983, which creates an explicit statutory cause of action for violations of the 14th Amendment. Nevertheless, this Court in *Brault* apparently concluded that this clear congressional intent did not counsel any hesitation in imposing liability upon municipalities for violations of constitutional rights. See, *contra*, *Perzanowski* v. *Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Smetanka* v. *Borough of Ambridge*, 378 F. Supp. 1366 (W.D.Pa., 1974).

In reaching its decision this Court implied that the congressional intention to exempt municipalities from liability under the Act of April 20, 1871, was somehow vitiated by the passage of the Act of March 3, 1875. This statute (now 28 U.S.C. §1331 (a)) gave to the federal courts original jurisdiction in civil actions wherein the matter in controversy was of a sum or value exceeding $500

(now $10,000) and arose under the Constitution, laws or treaties of the United States. This court reasoned that in passing the Act of March 3, 1875, Congress decided that the municipal exemption from liability granted by the Act of April 20, 1871 was to be limited to cases in which the matter in controversy had a value less than the $500 jurisdictional amount required by the Act of March 3, 1875. In other words, the Act of March 3, 1875 empowered the federal courts to entertain a case which is based directly on the 14th Amendment if the plaintiff's claim against the municipal defendant has a value in excess of the $500 jurisdictional amount. If, however, the claim is valued at less than $500, the plaintiff's only entry to the federal courts is pursuant to the Act of April 20, 1871 (now 42 U.S.C. 1983) which, while affording entry to the federal courts, unfortunately precludes recovery by virtue of its grant to municipalities of an exemption from liability. We submit that this peculiar jurisdictional scheme suggested by *Brault* as a means of harmonizing its construction of 28 U.S.C. §1331 with congress' intention to exclude municipalities from liability under 42 U.S.C. §1983 has no basis in the history of 28 U.S.C. §1331, and in fact makes no sense at all. It preserves the hard fought for municipal immunity from damages where the exposure to liability was trivial (less than $500) but wiping out such immunity where the exposure was—to an unlimited extent—greater.

Prior to the enactment of the Act of March 3, 1875, United States citizens had to secure in state courts the vindication of rights conferred by federal law. With the passage of the Act, a vast range of powers which had lain dormant in the Constitution since 1789 were conferred upon the federal courts. This immense expansion of the power of the federal judiciary barely received a contem-

porary comment. Indeed, the Act, unlike the Act of April 20, 1871, evoked little debate on the floor of the Congress, and the Supreme Court has described the Act as "rather hastily passed." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 548 (1971). The bill as originally passed by the House did no more than amend the procedures governing removal proceedings. In the Senate, the Judiciary Committee proposed the bill in its present form as a substitute for the House bill. The substitute was passed by the Senate on the very day of its introduction. Eventually the bill went to conference where the Senate version emerged unchanged. The House then passed it and the President signed it on March 3, 1875. *See* Frankfurter and Landis, *The Business of the Supreme Court*, pp. 65-69.

In view of this legislative history, we submit that there is no basis for this Court to hold that the clear congressional intent to exempt municipalities from liability under the statutory cause of action for violation of the 14th Amendment (42 U.S.C. §1983) should be disregarded when a constitutional cause of action is created by the courts pursuant to a different and historically silent congressional grant of jurisdiction (28 U.S.C. §1331). Under these circumstances, we contend, there exists, in the language of *Bivens*, a strong "special factor" counselling the court to either refuse to create a cause of action founded directly upon the 14th Amendment, or else to extend to that cause of action the same municipal exemption from liability granted by Congress when it created the statutory cause of action for violation of the 14th Amendment.

(5)

In addition to the clear congressional intent to grant to municipalities an exemption from liability for violations of the 14th Amendment, there is another special factor counselling hesitation in deciding that the 14th Amend-

ment implies a federal cause of action for its violation. The 14th Amendment is by its language directed towards *state action*. Implicit, albeit unstated, then, in this court's decision in *Brault* is a finding that the Town of Milton's actions were state action for purposes of the 14th Amendment. Ironically, however, if the Town was in fact a state it would be immunized from liability via the 11th Amendment. Of coure, it is settled law that a city is not a state for the purpose of claiming immunity under the 11th Amendment. *Lincoln County* v. *Luning*, 133 U.S. 529 (1890); *Hopkins* v. *Clemson College*, 221 U.S. 636 (1911). We submit that it is an odd result to hold that a municipality is a state for the purpose of imposing liability under the 14th Amendment but is not a state for the purpose of claiming immunity under the 11th Amendment. Moreover, the incongruity of such a result was apparently brought home to Congress when it enacted Section 1983.

In reviewing the history of the exemption given to municipalities from liability pursuant to 42 U.S.C. §1983, Justice Douglas noted in *Monroe* v. *Pape*, 365 U.S. 167, 190-191 (1960):

> "The objection to the Sherman Amendment [to impose liability upon municipalities] stated by Mr. Poland was that 'the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.' The question of constitutional power of Congress to impose civil liability on municipalities was vigorously debated with powerful argument advanced in the affirmative."

The Court then held that it did not have to reach the question whether Congress has the power to make mu-

nicipalities liable for acts of its officers that violate the civil rights of individuals because Congress' intention to exempt municipalities from such liability was clear.

In holding the Town of Milton liable in damages for violating the 14th Amendment this Court appears to have assumed that it possessed a power which Congress eschewed to assume. We submit that the concern of Congress that it lacked the power to subject municipalities to liability, and the Supreme Court's refusal to decide that question, both counsel hesitation by this Court in holding municipalities liable for damages for violation of the 14th Amendment.

There are, in addition, other considerations which, we submit, militate against grounding a cause of action directly upon the 14th Amendment and holding a municipality liable thereon. The 14th Amendment, unlike the 4th Amendment, casts a wide net. Virtually every tort, contract, condemnation and zoning case in which a municipality is involved can be framed in terms of a violation of the 14th Amendment and, under *Brault*, it would appear that, as long as $10,000 in damages are alleged, entry into a federal forum is assured. The result in New York would be that the federal courts attain concurrent jurisdiction with the New York State Supreme Court in virtually every case in which the City is a defendant. The City will not know where it has to defend itself until the plaintiff has done some forum shopping. The plaintiff's choice of forum will largely hinge upon the nature of the defenses available to the municipality in each forum. Moreover, *Brault* suggests that wherever there is a finding of unconstitutionality, money damages should be allowed. Very respectfully, such a result would be patently improper. Cf. *Matter of Keystone Assoc.* v. *Moerdler*, 33 NY2d 848, 850 (1973) (Breitel, J., dissenting).

Brault provides an insight into the City's problem. Vermont law apparently holds that a municipality is immune from liability and therefore plaintiff could not successfully sue the Town of Milton in the state courts. The thrust of the opinion in *Brault*, however, is that the federal courts will not entertain the defense of municipal immunity. We may only wonder whether all the defenses against and the restrictions upon municipal liability which have been created by the states to protect the fiscal integrity of their cities and towns will also be rejected by the federal courts in cases where the cause of action is purportedly founded upon the 14th Amendment. If some defenses will remain available to the municipality, we may only speculate as to the court's criteria for determining which defenses are viable in the federal courts and which are not. Will special statutes of limitations applicable to cases against a city in state courts be held to apply? Will state limitations on the scope of damages be honored? The unanswered questions left by *Brault* are numerous. Only extensive litigation in the federal courts will provide the answers. In the meantime, our cities and towns will be left uncertain of the degree of their exposure to damage actions in the federal courts.

Brault leads both the federal courts and the nation's municipalities down a legal path which can only be dimly perceived at present. We have attempted to point out in this brief some of the pitfalls lurking on that path. We submit that for all the reasons previously set forth this Court should reconsider both the wisdom and necessity for creating a constitutional cause of action premised upon the 14th Amendment. As Judge Timbers wrote in his dissenting opinion in *Brault*, "Such holding, virtually of first impression, surely will work mischief in every municipality in the land."

(6)

Assuming that the *Brault* case is correct and that a cause of action can be founded directly upon the 14th Amendment, we submit that the decision should be held to apply only where it is claimed that an adequate state court or federal statutory remedy does not exist. In *Brault*, the State of Vermont so severely limited municipal liability in the state courts that the plaintiffs, who had suffered some $85,000 of damages, could only recover $500. In the instant case the remedies against the City which were available to Nathaniel Cooper in the courts of the State of New York are as generous as any he is likely to find in the federal courts. For this reason, we submit, it should be held that no constitutional cause of action will be implied.

In addition, the *Brault* case did not deal with the question whether the legal doctrine of *respondeat superior* applies to a constitutional cause of action. In *Brault* the injuries which were inflicted by the Town of Milton flowed from its invalid enactment of a municipal ordinance. In enacting an ordinance a town performs an act which is essentially characteristic of a municipal corporation. It is difficult to conceive of a situation in which a municipal corporation acts more clearly *qua* municipal corporation than in enacting local legislation. Indeed, the Court's opinion indicates that the Town of Milton enacts zoning legislation at town meetings, where, presumably, each member of the municipal corporation may speak and vote. It is not difficult under such circumstances to hold the collectivity called the Town of Milton liable for an act in which each member shared. The City of New York, on the contrary, is the largest municipal corporation in the United States. Its government is republican in form. More importantly, the plaintiff here alleged that he was

injured by the action of two of the city's half-million employees, who allegedly beat him. These employees held the positions of guards at one of the dozens of municipal welfare centers. Even if plaintiff proves his allegation, the imputation of the guards' act to the City of New York is nothing more than a legal fiction.

This Court has held that when monetary damages are sought under §1983 the general doctrine of *respondeat superior* does not suffice and a showing of personal responsibility on the part of the defendant is required. *Johnson* v. *Glick*, 481 F.2d 102 (2nd Cir., 1973). In view of this decision, we submit that there is no logical reason to allow recovery of monetary damages on the theory of *respondeat superior* in a case founded upon a constitutional cause of action for violation of the 14th Amendment.

Finally, even if the doctrine of *respondeat superior* is sufficient to secure monetary damages against a municipality in a case founded upon a constitutional cause of action for violation of the 14th Amendment, we submit that plaintiff here has failed to either allege or prove damages in excess of the $10,000 jurisdictional requirement of 28 U.S.C. §1331(a). As even *Brault* makes clear, a constitutional cause of action can only be entertained pursuant to 28 U.S.C. §1331 (a) where the $10,000 requirement is met. Although Judge Bonsal wrote in his memorandum of December 6, 1974, granting the City summary judgment that plaintiff "appears to seek compensatory and punitive damages in the amount of $50,000" the complaint dated July 2, 1974, states no amount of damages and merely alleges $160.00 in dental expenses and $40.00 of lost earnings. We submit that such meager losses on the part of the plaintiff would not support a claim for $10,000 in damages, much less $50,000. Therefore, plaintiff failed to either allege or prove damages in excess of

the $10,000 amount required to 28 U.S.C. 1331 to confer jurisdiction on the district court and his complaint should be dismissed.

CONCLUSION

The Order Appealed From Should Be Affirmed.

April 15, 1975

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel
of the City of New York,
Attorney for the Appellees.

L. Kevin Sheridan,
Michael Ambrosio,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 15 day of April 1975, he served the annexed Appellant Brief upon Nathaniel Cooper Esq., the attorney for the Pro Se herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 377 Miller Ave in the Borough of Brklyn, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
15 day of April 1975

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Carlos M Rodriguez

Form 323-40M-703823(73) 346